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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	No.	01-30923 DM
PACIFIC GAS & ELECTRIC COMPANY,	Chapter	11
Debtor.	Date:	July 5, 2001
	Time:	9:30 a.m.
	Place:	235 Pine St., 22nd Floor San Francisco, California

UNITED STATES TRUSTEE'S REPLY TO PG&E'S OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER VACATING THE APPOINTMENT OF THE OFFICIAL RATEPAYERS COMMITTEE

INTRODUCTION

The ratepayers' have claims. The Court, PG&E and the Creditors' Committee implicitly acknowledge the existence of these contingent claims, but postulate the U.S. Trustee has the additional burden of proving, to the point of advocacy, the contingent claims and of proving the ratepayer/creditors hold claims qua ratepayer.[1/] Neither case law, nor § 101(5), nor its legislative history supports these additional conditions. To appoint a separate committee of ratepayers, the U.S. Trustee need not prove, nor would it be appropriate for her to prove, ratepayer claims or to demonstrate ratepayer claims are claims qua ratepayer.

Ratepayers have contingent pre-petition claims, garden variety and qua ratepayer. In response to the motion to reconsider, PG&E acknowledges PG&E's general counsel was wrong at the hearing in asserting refunds arising out of pre-petition conduct take only the form of future rate adjustments. The Pease Declaration filed with PG&E's response admits the statement is "generally" true and "on occasion the CPUC does require PG&E to provide notice in newspapers that a refund is available to former customers who request it." Ratepayers have claims against PG&E, a legal right PG&E's General Counsel denied existed in statements upon which the Court expressly relied in its decision.

In her discretion, the U.S. Trustee determined ratepayer claims cannot be adequately represented by the Official Unsecured Creditors' Committee. Common sense dictates that ratepayers' interests as creditors conflict with the interests of other unsecured creditors. Unlike other creditors, ratepayers will not look first to the ratepayers as a source of payment. How future rates and performance may be affected by the Court's myriad decisions is a legitimate interest.

[1/] This brief serves as a response to the Creditors Committee's separate joinder in PG&E's opposition to the motion for reconsideration. Like their joinder in PG&E's prior motion to vacate the appointment of the Ratepayers Committee, the Creditors Committee's current brief raises no additional issues and is simply a superficial restatement of PG&E's points, including once more the identical misreading of the *Public Service of New Hampshire* and *Eastern Maine Electric Cooperative* cases.

I. RATEPAYERS HAVE PRE-PETITION CLAIMS.

Assuming *arguendo* ratepayers must have claims qua ratepayers to be eligible for membership in a committee, the U.S. Trustee has properly determined those claims exist. Ratepayers have contingent claims qua ratepayer for rebates based on utilities laws and other state laws including unfair business practices. In addition, their ordinary claims including tort claims give rise to creditor status.

A. The U.S. Trustee Provided Authority to Support the Existence of Ratepayers' Claims Qua Ratepayer.

The CPUC instituted an investigation of PG&E's pre-petition transfers to its parent corporation to determine if they were wrongful, causing the utility to be undercapitalized and leading to the breach of PG&E's utility obligation to supply power.[2/]

The CPUC action questioning the propriety of these pre-petition transfers sets the stage for ratepayer claims based on wrongful conduct and violations of law, including unfair business practices. *See L.A. Cellular Telephone Co. v. Superior Court*, 67 Cal.App.4th 1013, 1019, 76 Cal.Rptr.2d 894, 898 (1998) (tariff limitation on utility liability does not apply to allegations of violations of law such as those arising under Cal. Bus. & Prof. Code § 17200).[3/] Even if the transfers are found not to constitute misconduct, ratepayers can still

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[2/] *Order Instituting Investigation Whether Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and Their Respective Holding Companies, PG&E Corporation, Edison International, and Sempra Energy, Respondents, Have Violated Relevant Statutes and Commission Decisions, and Whether Changes Should Be Made to Rules, Orders, and Conditions Pertaining to Respondents' Holding Company Systems* (2001) Cal. P.U.C. No. 01-04-002. *See id.* at 15-16 (noting holding companies' obligation, under prior CPUC decision, to give "first priority" to utilities' capital needs to discharge utility obligation to serve, and ordering utilities to show cause why they failed to infuse capital as the utilities' financial conditions deteriorated and to show cause "why their evident failure to provide sufficient capital to their utility subsidiaries . . . did not violate . . . the 'first priority' condition" of that decision). [Emphasis added.]

[3/] PG&E invokes Rule 14 of its tariff as exempting it from liability when, in fact, the rule at most narrows only the scope of its liability. PG&E quotes a sentence fragment from the third paragraph of Rule 14 for the proposition that "[u]nder no circumstances shall PG&E be liable to its customers or their agents" for any ISO-ordered blackouts. PG&E opposition to UST motion to reconsider (PG&E Opp.) at 6-7. The full sentence reveals it is merely intended to prescribe the conditions under which the utility may avoid liability:

> Under no circumstances shall PG&E be liable to its customers or their agents for any local or system deficiencies in supply stemming from inadequate bids into the Power Exchange (PX), or power deliveries over the Independent System Operator (ISO) grid."

Declaration of Margaret McGee in support of U.S. Trustee's objection to PG&E's motion to vacate appointment

base their claims on negligent transfers leading to the breach of PG&E's duty to supply power. The U.S. Trustee has cited numerous cases from California and other states holding tariff provisions with similar language expose utilities to liability for claims of negligence, gross negligence, intentional torts, willful misconduct, and fraud.[4]

PG&E argues the CPUC proceeding "is an enforcement-related proceeding . . . [that] would result in enforcement-related remedies, such as civil penalties . . . , not refunds to ratepayers." PG&E Opp. at 4. PG&E is wrong. PG&E uses as authority section 2104 of the California Public Utilities Code. [5] Section 2104 does not preclude refunds. On the contrary, section 2106 expressly authorizes, in addition to penalties, actions for monetary relief:

> Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual

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of Ratepayers Comm. (McGee Decl.), Ex. A. Rule 14 does not shield PG&E from liability if the blackouts "stem[med]" or "result[ed]" from other factors, such as PG&E's own business practices that may have caused or exacerbated the need for rolling blackouts.

PG&E ignores the paragraph in Rule 14 that renders it liable to its customers for an interruption in the supply of electricity caused by its own negligence. The tariff plainly states the utility is liable for "any loss or damage . . . arising from its failure to exercise reasonable diligence." McGee Decl. Ex. A.

PG&E's liability could also be predicated not on the ISO's receiving too few bids nor a transmission constraint, but on wrong-doing, inter-corporate transfers and other acts that constitute unfair business practices, mismanagement, and other violations of law that resulted in PG&E's failure to provide sufficient power to meet its ratepayers' loads. At the hearing, this Court recognized that antitrust claims under California's Cartwright Act are not barred. Hearing, May 18, 2001 Transcript ("May 18 TR") at 47. Similarly, claims under California's Unfair Business Practice Act (Cal. Bus. & Prof. Code §17200, *et seq),* are not barred.

[4] In a misdirection-gambit, PG&E cites *Neihaus Bros. Co. v. Contra Costa Water Co.,* 159 Cal. 305 and *Lowenschuss v. Southern California*, 11 Cal.App.4th 496 (1992) for the proposition that utilities cannot be held liable "beyond their tariffs," and then accuses the U.S. Trustee of asserting "nonsensically that ratepayers may pursue claims against PG&E beyond Rule 14 . . . ." PG&E Opp. at 6, n.7. The nonsense is PG&E's. The U.S. Trustee is not alluding to liability beyond Rule 14 but under Rule 14, which explicitly (in language broader than the tariffs in *Neihaus Bros.* and *Lowenschuss*) imposes liability on PG&E for, *inter alia*, failure to exercise due care. It is also true that California law clearly provides for utility liability for acts and omissions not founded on terms of a tariff but on other provisions of law, such as liability for unfair business practices. See *L.A. Cellular Telephone Co. v. Superior Court*, 67 Cal.App.4th 1013, 1019, 76 Cal.Rptr.2d 894, 898 (1998).

[5] PG&E also refers to a section 798.5 of the same code, but no such section exists. Perhaps it is referring to section 792.5, cited later on page 4 of its Opposition. If so, that section merely directs the CPUC to require utilities to reflect "specific changes in costs" in a balancing account for future rate adjustments. It is not authority for PG&E's assertion that only civil penalties can be ordered.

> damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.
>
> No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.

Cal. Pub.Util.Code § 2104 (Emphasis added).

It is irrelevant to ratepayers' contingent claims that the CPUC investigation into PG&E's inter-affiliate transfers is an "enforcement-related proceeding" that may result in only "enforcement-related remedies remitted to the State of California, not refunds to ratepayers." PG&E Opp. at 4. Even if the CPUC declined to order refunds upon finding PG&E's business practices contributed to the blackouts, its ruling would collaterally estop the utility's defenses in a separate action brought by a ratepayer under section 2106.

Neither the pending enforcement actions nor any provision of law precludes ratepayer actions to recover refunds premised on the same allegations. Indeed, such actions would be greatly facilitated by a prior determination that the utility acted wrongfully. See *Napa Valley Co. v. R.R. Com.*, 251 U.S. 366, 40 S.Ct. 174, 64 L.Ed. 310 (1920) (Public Utilities Commission decision followed by summary denial of review by state Supreme Court is *res judicata*); *In re Rose*, 22 Cal.4th 430, 993 P.2d 956, 93 Cal.Rptr.2d 298 (2000).

The CPUC's pre-petition decision allowing a rate increase explicitly recognizes ratepayers have claims to refunds that may be ordered in the future for pre-petition acts or omissions. The Commission said it was conditioning its rate increase on PG&E's (and the other utilities) taking all "actions necessary to assure that California and its utility customers realize refunds for or repayments or disgorgement of power seller overcharges." CPUC D.01-03-082 at p. 17 (emphasis added). To the extent the generators and sellers are ordered to make refunds, "those refunds should either be passed through [to] ratepayers or applied to unrecovered power purchase costs. . . ." *Id.*, p. 18 (emphasis added).

PG&E misleads the Court when it describes this CPUC decision as "an accounting decision which deals solely with balancing account overcollections and undercollections," (PG&E Opp. at 4). It ignores the explicit language just quoted in the decision that

recognizes the potential for ratepayer refunds. PG&E pretends it does not exist and asserts: "Again, no claims by ratepayers — contingent or otherwise — are referenced anywhere in the CPUC decision." PG&E Opp. at 4. It is difficult to describe this statement as anything but false.

B. PG&E, the Court and the Creditors' Committee Concede the Basis for Ratepayers' Contingent Claims.

1. The Basis for "Ordinary" Claims Such as Negligence is Conceded.

The Court and the Official Unsecured Creditor' Committee concede a basis for ratepayers' ordinary claims for such things as negligence. See May 18 Decision at 6; Creditors' Committee joinder in PG&E's motion to vacate appointment of Ratepayers Committee at 2. A ratepayer appearing *pro per* at the hearing asserted a claim for negligence. His right to appear and assert his claim was acknowledged by the Court. May 18 TR at 35-37.

With approximately 4.5 million customer accounts for businesses, farms and residential users, the existence of pre-petition tort and other claims is a statistical certainty. Indeed, it is likely a significant number of such claims already exist. PG&E appears to concede contingent claims exist if they are a statistical certainty:

> These cases [mass torts cases cited by the U.S.Trustee] are fundamentally distinct from the present case [PG&E]. In the mass tort bankruptcy cases, that a group of future claimants will exist based on the debtor's [pre-petition] conduct is a matter of statistical certainty (*see In re Johns-Manville Corp., 36 B.R.* at 755),...

PG&E Opp.at 11. The U.S. Trustee submits to the extent ratepayers claims based on pre-petition conduct are not already in evidence, they are a statistical certainty.

2. PG&E Concedes Past and Present Ratepayers Can Receive Refunds for Rate Overcharges.

While belittling the significance of rate refunds, PG&E finally concedes refunds are ordered to past and present customers. At the hearing, PG&E's utility law expert asserted a ratepayer who moved to New York would not get the benefit of a rebate because it would be reflected only in future rates. May 18 TR at 45. Faced with the citation of utility case law and statute, PG&E now argues that "generally" and "usually" rebates affect future rates.

See PG&E's Declaration of Daniel Pease. Clearly, PG&E concedes the law provides for refunds.

It is well-established that refunds ordered by the CPUC must be distributed to both former and current customers of the utility pursuant to section 453.5. *California Manufacturers Association v. Public Utilities Commission,* 24 Cal.3d 836 (1979) is directly on point. In that case, the California Supreme Court held that refunds received by utilities from some of their interstate natural gas suppliers must be distributed in accordance with section 453.5 and not applied to the utilities' "gas balancing account" as provided for by section 792.5. *Manufacturers Association* holds that the statutory term "rate refunds" used in section 435.5 "refers to specific amounts held by utilities as rebates from their suppliers and earmarked for customer `refunds' by prior commission orders and utility tariffs." *Id.* at 845. Here, refunds sought by ratepayers will be based on PG&E's failure to pursue funds from its suppliers and its wrongful pre-petition transfers to its parent corporation. If the CPUC decides to issue such refunds, they will be "specific amounts held by [the] utilit[y] as rebates from [its] suppliers" and parent corporation, and will certainly fall within the scope of section 453.5, as defined in *Manufacturers Association*.

PG&E cannot cite any decision even suggesting that section 453.5 does not allow equitable apportionment among current and former utility customers "when practicable." The CPUC does not exclude former utility customers from the distribution of refunds unless it determines such distribution is not feasible. See *Manufacturers Association*, at 848-49; *Cory v. Public Utilities Commission* 33 Cal.3d 522, 528 (1983); *Assembly of the State of California v. Public Utilities Commission*, 12 Cal.4th 87, 100-01. In *Assembly* and *Cory,* cited by PG&E (PG&E Opp. at 5), the CPUC acknowledged it was under an obligation to distribute funds to both current and former customers when practical, but determined that identifying former ratepayers was not feasible under the circumstances. In *Assembly* and *Cory*, the CPUC findings of impracticability were based on overcharges collected many years before the Commission's order issuing the refunds. See *Assembly,* 12 Cal.4th at 93. This Court is neither required nor authorized to engage in speculation to determine whether

PG&E's present and former ratepayers will get refunds. Were this Court required to assay PG&E ratepayers' prospects on their contingent claims for refunds, it is unlikely to find authority for the CPUC to avoid the clear policy favoring refunds.

Let there be no mistake. The U.S. Trustee reiterates her position that whether ratepayer claims take the form of refunds or future rate adjustments, both are claims if they result from pre-petition conduct. How these ratepayer claims are paid is irrelevant to their existence. It is the alleged pre-petition conduct, not the method of payment, that gives rise to these claims and makes the holders of these claims or their representatives eligible to serve as proper members of a committee appointed by the U.S. Trustee under § 1102(a)(1).

II. PG&E'S RESTRICTIVE VIEW OF CONTINGENT CLAIMS IS NOT CONSISTENT WITH CASE LAW AND LEGISLATIVE HISTORY.

A. The Expansive Definition of Claim Supporting Ratepayers' Claims Is Accurately Represented in the U.S. Trustee's Prior Briefs.

In her prior briefs, the U.S. Trustee showed case law citation of legislative history adopting the expansive view of "claim" under the Code. In *In re Johns-Manville,* 36 B.R. 743 (Bankr.S.D.N.Y. 1984), the court defined "claim" broadly to include the unknown contingent claims of asbestos tort victims who were exposed pre-petition, but would manifest the disease only after the debtor's reorganization. The *Johns-Manville* court rejected the view under the Act of "right to payment" as a matured state law right to payment. [6]

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[6] In enacting the Bankruptcy Code, Congress specifically intended to afford the broadest possible scope to the definition of "claim" so as to enable Chapter 11 to provide pervasive and comprehensive relief to debtors. The legislative history of section 101(4) [now § 101(5)] explains:

> The effect of the definition [of claim] is a significant departure from present law [the former Bankruptcy Act]. Under present law, claim is not defined in straight bankruptcy. Instead, it is simply used, along with provability in section 63 of the Bankruptcy Act, to limit the kinds of obligation that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of the present law far more broadly. *The definition in paragraph (4) adopts an even broader definition of claim .... The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, legal, equitable, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured . The definition also includes as claim an equitable right to performance that does not give rise to a right to payment. By this broadest possible definition and by the use of the term throughout title 11, especially in subchapter I of chapter 5, the bill [Bankruptcy Code] contemplates that all legal obligations of the debtor no matter how remote or contingent will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.*

In its opposition, PG&E implies that, by quoting *Johns-Manville* on legislative history, the U.S. Trustee is relying on a superceded portion of that history stating a claim includes an equitable right that does not give rise to a right to payment. PG&E is engaging in the annoying and distracting rhetoric and use of straw men that pervade all its briefs on the issue of the U.S. Trustee's authority to appoint a ratepayers' committee.

The U.S. Trustee cites Judge Lifland's use of legislative history in *Johns-Manville* to show the scope of claim and the change in meaning from the Act - a matured state-law right to payment - to the more expansive definition of a right to payment under the Code. Prior to quoting *Johns-Manville's* citation of the legislative history, the U.S. Trustee's initial brief prominently quotes § 101(5) including the correct language describing equitable claims. More importantly, in neither of the U.S. Trustee's briefs does she argue ratepayers have claims based on purely equitable rights not reducible to a right to payment. The ratepayers' concerns/claims based on future rates and performance, whether "equitable" or otherwise, are not the basis for creditor status but simply a "plus" factor supporting the U.S. Trustee's decision to appoint a separate committee for ratepayers.

In *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198, 202-03, (4th Cir.), *cert. dismissed*, 487 U.S. 1260, 109 S.Ct 201, 101 L.Ed. 2d 972 (1988), a court again reads "claim" expansively, holding that, while the state law giving rise to a claim is triggered by the disease's manifestation, a victim who manifests symptoms after the bankruptcy filing holds a claim in the bankruptcy and will not be given relief from stay to go to state court. [7]

> House Report. No., 95-595 to accompany H.R. 8200 9th Cong., 1st Sess. 309(1977), pp. 308-314, U.S. Code Cong. and admin. news 1978, pp. 5787, 6265 - 6271. [emphasis added]

Johns-Manville, 36 B.R., at 754-55, fn. 6.

[7] > The legislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy. The Code contemplates the broadest possible relief in the bankruptcy court.
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> * * *
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> *Blacks Law Dictionary*, 5th Ed., 1979, defines "contingent" as follows, and we adopt this definition, there being no indication that Congress meant to use the word in any other sense:
>
> Contingent. Possible, but not assured; doubtful or uncertain; conditioned upon

In *In re Dow-Corning*, 194 B.R. 121 (Bankr. E.D. Mich. 1986), pursuant to § 1102(a)(1), the court ordered the appointment of an additional committee based on attenuated contingent claims of physicians who *might* have claims against Dow for contribution if Dow's tort victims were successful in their suits against them, a future condition precedent to the existence of the claim:

> These claims, even if the contingencies are removed, are disputed by the Debtor.
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> Given that committees have been ordered for future claimants, priority claimants and others whose ability to currently vote a claim is problematical or non-existent, it appears that there is no legal reason why a committee for persons with contingent claims cannot be ordered

Id. at 145. Under the expansive scope given "claim" in the Code, the legislative history of the Code, and by the courts, PG&E ratepayers have contingent claims and they are creditors entitled to a committee.

B. The "Fair Contemplation" Test for the Existence of a Claim Does not Impugn the Existence of Ratepayers Claims.

1. The Fair Contemplation Test Has Little If Any Application to the Claims Issue Now Before the Court.

The fair contemplation test was devised primarily to deal with toxic cleanup obligations in bankruptcy cases. It has little if any application here. [See discussion and cases cited in *In re Jensen,* 995 F.2d 925 (9th Cir. 1993).]

Courts have struggled to balance bankruptcy's fresh start and discharge of contingent claims with the goal of environmental laws like CERCLA which create enduring obligations for toxic cleanup. Under the "relationship" test, the conduct causing the environmental damage has to occur pre-petition to discharge claims based on that damage even if no one knew about the damage until after the bankruptcy case. *Id.* at 929-30. The court in *Jensen* viewed the "relationship" test as too broad a release of claims. *Jensen* adopted the "fair

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> occurrence of some future event which is itself uncertain, or questionable. Synonymous with provisional. This term, when applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present interests exists, and that whether such interest or right ever will exist depends upon a future uncertain event.

Id. at 202.

contemplation" test requiring that a claimant have some knowledge of the incident prior to a bankruptcy for a claim to be discharged. Liability for environmental damage need not be established pre-petition, but the pre-petition conduct that is arguably wrongful must be known by the claimant.

The fair contemplation test was designed to protect those who have no notice or opportunity to participate in a bankruptcy from having their claims released. The test is grounded in principles of due process and notice. It has not been used to determine whether contingent claims exist sufficient to allow appointment of a committee. The appointment of a committee has no binding or determinative effect on whether the committee or the claimants it represents can ultimately establish their claims. At some point if ratepayer claims can be established and dealt with, the test might come into play. See, e.g., *In re Matter of Johns-Manville,* 68 B.R. 618 (Bankr. S.D.N.Y. 1986) (class of future tort claimants were bound by the plan because they were adequately represented by a court-appointed legal representative throughout the case, treated in the plan, and given notice of the plan).

2. In Any Event, Ratepayers Knew of Their PG&E Claims by Virtue of the CPUC Order Instituting Investigation and Conditional Rate Increase.

Under the fair contemplation test, the ratepayers have claims. Their claims are based on known pre-petition conduct. In the CPUC's investigation and conditional rate increase, PG&E's pre-petition conduct was identified as potentially improper or wrongful. Ratepayers have contingent claims because their claims are based on suspect or improper conduct known to exist prior to the filing of this case. Liability need not be established or even alleged pre-petition to satisfy the fair contemplation test. *Jensen* at 928-29.

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III. DESPITE ATTEMPTS, PG&E CAN NOT JUSTIFY THIS COURT'S APPLICATION OF THE STANDARD OF REVIEW OF THE U.S. TRUSTEE'S APPOINTMENT OF THE COMMITTEE.

A. In Reviewing the U.S. Trustee's Appointment, this Court Substituted Its View Rather Than Reviewing the Reasonableness of the U.S. Trustee's Interpretation of the Law and Facts in Making the Appointment .

This court incorrectly applied a *de novo* review to the U.S. Trustee's committee appointment when it found ratepayers had to have an unsecured claim separate and distinct from the unsecured creditors represented by the committee already created. The court replaced its judgment for the U.S. Trustee's. The U.S. Trustee's factual and legal conclusions should have been, but were not, reviewed under the reasonableness standard adopted by the Ninth Circuit. See *CHW West Bay v. Thompson,* 246 F.3d 1218 (9th Cir. 2001) and cases cited therein. No matter how hard PG&E tries to conform the record to meet the proper standard, it cannot do so.

When a court is required to address an agency's construction of a statute, a court analyzes the reasonableness of the agency's interpretation as well as the reasonableness of the decision-making process. *Id.* at 1223. If the agency's interpretation is a reasonable one, a court "may not substitute its own construction of the statutory provision." *Id.* Even if the agency's interpretation is not the only possible one, or even if it is not the one the court would have chosen, the agency's action should stand if the court finds the interpretation reasonable. *Id. (*and cases cited therein*)*. The court then looks at the decision making process and decides whether the process was reasonable. The Court did not apply this standard of review.

B. The U.S. Trustee's Interpretation of § 1102(a)(1) in Making the Appointment is Reasonable.

In appointing the ratepayers committee, the U.S. Trustee interpreted §1102(a)(1) two ways. First, she interpreted § 1102(a)(1) to allow her to create a committee of unsecured creditors whose claims may overlap claims of an already existing committee, but whose claims, on the whole, are not adequately represented by the existing committee. Second, she broadly interpreted the definition of "claim." The Court did not find the U.S. Trustee's interpretation of "claim" as used in § 1102(a)(1) unreasonable. Instead, the Court restricted the U.S. Trustee's ability to form an additional committee of unsecured creditors by erroneously insisting members of the additional committee have claims they alone can assert. The U.S. Trustee disagrees. She submits she need not show that ratepayers have

claims qua ratepayers. It is well within her discretion as the person in charge of the administration of this case to appoint a separate committee of ratepayers.

The Court never reviewed the UST's decision making process. PG&E began its attack on the committee with the bare assertion no claims existed. PG&E's assertion was based on mis-statements of California law and the bankruptcy law definition of claims. This assertion was essentially accepted without question by the Court. Rather than reviewing the reasonableness of the U.S. Trustee's determination that the ratepayers have claims qua ratepayer, this Court decided no such claims exist. The U.S. Trustee had a reasonable basis to determine PG&E ratepayers have claims, qua ratepayer and otherwise. Both the Court and PG&E have subsequently implicitly conceded a basis for ratepayer claims.

C. Burden is on PG&E to Prove Appointment was an Abuse not on the U.S. Trustee to Prove the Appointment Has a Basis in Law and Fact.

The Court incorrectly placed the burden on the U.S. Trustee to prove her actions were justified in fact and under the law. PG&E confuses standard of review with burden of proof. Contrary to PG&E's statements, the U.S. Trustee need not initially articulate a "rational basis for its conclusion" nor does the U.S. Trustee "necessarily bear the 'burden' of explaining the basis for the appointment of the Ratepayers' Committee." The burden of proof applied in review of an agency action under the Administrative Procedure Act is with the objecting/moving party not the agency. See, e.g., *Downer v. United States*, 97 F.3d 999, 1002 (8th Cir. 1996) (action by Department of Agriculture); *Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.,* 794 F.2d 1339 (8th Cir. 1986) (action by Federal Home Loan Bank Board). The burden was on PG&E to show the U.S. Trustee's action in appointing a ratepayers' committee was arbitrary or capricious, abuse of discretion, or not authorized by law. *Foothill Presbyterian Hosp. v. Shalala,* 152 F.3d 1132, 1134 (9th Cir. 1998) (applying Administrative Procedures Act standard of review to agency decision). PG&E cannot meet this burden. It cannot show that ratepayers did not have claims or the U.S. Trustee's interpretation of the statute was unreasonable. PG&E progressively conceded a basis for ratepayer claims, as did the Court.

IV. THE INTEREST OF RATEPAYERS IN FUTURE RATES AND PERFORMANCE IS A LEGITIMATE CONCERN TO BE RECOGNIZED IN THE CASE, NOT A DISQUALIFIER FOR MEMBERSHIP IN A COMMITTEE.

A. Interest in PG&E's Performance Does Not Make the Ratepayers Ineligible for Committee Membership.

The dual interest of ratepayers, in their claims and in future rates and performance, far from being a disqualifier, is a legitimate consideration in the U.S. Trustee's decision to form a separate committee and supports her exercise of discretion. That the ratepayers have a legitimate concern about performance does not make the U.S. Trustee's decision arbitrary or capricious.

In *In re Altair Airlines*, Inc., 727 F.2d 88 (3rd Cir. 1984), the court recognized the pilots union had a legitimate interest in serving on the creditors' committee. Although the members had only a minimal concern for their priority wage claims, they had substantial concerns over their future financial stake in employment:

> Undoubtedly ALPA's [Airline Pilots Associations] members may be interested in a plan of reorganization which preserves both their jobs and their collective bargaining agreement, while other creditors may be interested in liquidation, or reorganization involving merger with a non-union airline. Such conflicts of interest are not unusual in reorganizations.
>
> Section 1103(c)(2) contemplates that the Creditors' Committee may "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, *and the desirability of the continuance of such business...*" (emphasis supplied). There is no reason why the voice of the collective bargaining representative should be the one claimant voice excluded from the performance of that statutory role.

Id. at 90.

The *Altair Airlines* court also decided the union's pension fund with only a disputed contingent claim could serve on the committee even though it would have a claim only upon the occurrence of a future event, i.e., if debtor were to withdraw from the multi- employer pension fund. Accord, *In re Barney's Inc.,* 197 B.R. 431, 440 (Bankr. S.D.N.Y. 1996)(holder of a disputed claim contingent on a future act may serve on the committee).

B. No Matter What the Size of Their Individual Claims, PG&E Ratepayers Have a Significant Financial Stake in this Bankruptcy Case.

In the May 18 decision vacating the appointment of the Ratepayers Committee, the Court cited *In re Public Service Co. of New Hampshire,* 88 B.R. 546, 553 (Bankr. D.N.H. 1988) to support the view that the future interest of ratepayers is not significant enough to warrant full and consistent participation in the case:

> Although clearly interested in the outcome of the Utility's organization [sic] proceedings, ratepayers arguably lack a strong enough investment in a utility to warrant an independent and unfettered voice in the reorganization.'
>
> *Public Service,* 88 B.R. at 553, *quoting* Flaschen & Reilly, *Bankruptcy Analysis of a Financially Troubled Utility,* 22 Hous.L.R. 965, 971-73.

May 18 Decision at 9.

The Court's interpretation of the *Public Service* court's view of ratepayer participation is inaccurate. In fact, the court in *Public Service* at 552, describes the quoted Flaschen article as "[a] somewhat narrower view" when compared to another quoted article by Professor Theodore Eisenberg expressing the contrary view. The *Public Service* court adopted the view that consistent unfettered participation by ratepayers was essential and found ratepayers were protected as parties in interest through participation of the State Attorney General. *Id.* at 555. The only utility case faced with the issue of whether customers with contingent claims are creditors held that they were. The court denied them a committee because the case was too far advanced. *In re Eastern Maine Elec. Co-op., Inc.*, 121 B.R. 917 (Bankr.D.Me. 1990). The case did not involve vacating a ratepayer committee appointed early in the case by the U.S. Trustee.

The court in *Public Service* was not presented with claims that ratepayers were creditors. The issue of whether they were eligible for a committee was never reached. Unlike this case, the Attorney General of New Hampshire in *Public Service* did not have a conflict and was able to participate for the ratepayers as well as the public interest generally.

In the appointment of the ratepayers' committee, the U.S. Trustee is defining the term "claim" broadly. She is not determining subject matter jurisdiction or the substance of any particular claim or even, definitively, whether ratepayer claims will be allowed. That decision lies within the purview of the Court. The U.S. Trustee is deciding only who participates in the

bankruptcy process and she believes the process should be inclusive rather than exclusive. In the creation of the ratepayers' committee, a ratepayer's particular claim may, in the end, not be allowed, but that decision does not mean the ratepayers should have been excluded from the process. It is noteworthy in their opposition to this motion, neither PG&E nor the Official Creditors' Committee seriously argues the position they stressed at the hearing that the Attorney General of California will appear in this bankruptcy case on behalf of ratepayers.

CONCLUSION

PG&E misled the Court on the ratepayers' contingent claims at the May 18 hearing. This court erred in finding ratepayers with pre-petition claims and then vacating the appointment of the ratepayers' committee. It was manifestly unfair for this court not to allow PG&E's ratepayers to appear through counsel at the hearing. Based on the foregoing, the U.S. Trustee respectfully requests the Court reconsider and vacate its May 18 Decision vacating her appointment of the Official Ratepayer's Committee.

Date: June 28, 2001

Respectfully submitted,

By: _____
Patricia A. Cutler
Assistant United States Trustee